82-1179
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,
Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN M. CANNON
Attorney for Petitioner

Suite 842
20 North Wacker Drive
Chicago, Illinois 60606
(312) 263-5163

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

QUESTIONS PRESENTED

1. Whether the court of appeals, by requiring an allegation of "intentional" discrimination on the basis of sex in order to state a claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (*"Title IX"*), or its regulations, prematurely rejected the decision of this Court in *Lau* v. *Nichols,* 414 U.S. 563 (1974), which upheld an "effect" standard under the legislation on which Title IX was patterned, where the complaint alleged that respondents conduct was "arbitrary and invidious" and petitioner had proposed to meet the constitutional (intentional) standard in the district court.[1]

2. Whether the decision of this Court in *Foman* v. *Davis,* 371 U.S. 178 (1962), remains viable in holding that the spirit of the Federal Rules requires a justifying reason which is "apparent or declared" for the denial of an opportunity to amend a complaint.

3. Whether a district court has jurisdiction to consider a motion for relief from judgment under Rule 60(b), Fed. R. Civ. P., in order to amend a complaint after appeal where the mandate of the court of appeals neither precludes nor itself grants an opportunity to amend.

---

[1] Certiorari to consider questions involving the continued viability of *Lau* has been granted in *Guardians Assoc. of Police* v. *Civil Service Comm. of the City of New York,* No. 81-431, where there is a fully-developed record after trial on the merits. If *Lau* is reaffirmed in *Guardians,* the additional questions presented herein will be moot because no amendment of the complaints would be necessary. *Guardians* was argued on November 1, 1982.

PARTIES

In addition to The University of Chicago, the respondents are Northwestern University and the medical school admissions committee and officials at each university. The federal officials who had supported the position of petitioner as respondents on the writ of certiorari previously granted by this Court, Docket No. 77-926, were dismissed as parties in the district court after remand. Later, in the court of appeals, the Department of Justice filed a brief and presented oral argument on behalf of the United States as *amicus curiae*, supporting the position of petitioner on the meaning of Title IX, the validity of the regulations and the enforceability of the schools' contractual obligation to observe those regulations.

SUBJECT INDEX

APPENDIX

TABLE OF CITATIONS

Cases

Statutes

Other

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decisions of the United States Court of Appeals for the Seventh Circuit affirming the renewed dismissal of the complaints in the captioned matter and denying petitioner an opportunity to correct the defects by amendment.

OPINIONS BELOW

The opinion of the court of appeals affirming the dismissal of the complaints for a second time after reversal and remand

of the first dismissal by this Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), is reported officially at 648 F.2d 1104 (7th Cir. 1981). The slip opinion is set out in the attached appendix. (pp. 1a-13a) The subsequent orders of the court of appeals relating to amendment of the complaints are not reported. Copies thereof are set out in the attached appendix. (pp. 1b-2g).

JURISDICTION

The decision of the court of appeals dismissing petitioner's appeals of the orders denying her motions for relief from judgment in order to amend the complaints is dated May 13, 1982. (App. p. 1f). A timely petition for rehearing was denied on October 6, 1982. (App. p. 1g). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

Section 901(a) of Title IX, 20 U.S.C. § 1681(a):

No person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of . . . professional education. . . .

Section 902 of Title IX, 20 U.S.C. § 1632:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

Section 21(b)(2) of the Title IX Regulations, 45 C.F.R. § 86.21(b)(2) (now, 34 C.F.R. § 106.21(b)(2)):

> A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

STATEMENT OF THE CASE

In October, 1974, petitioner applied for admission to the 1975 entering class at each respondent medical school. She was an experienced surgical nurse over 30 years of age who was then completing her baccalaureate degree *cum laude*. Her academic qualifications, including college grade point average and Medical College Admission Test scores, were higher than those of a substantial number of the students subsequently admitted by each school.

After voluntary action by the schools and administrative action by the Department of Health, Education and Welfare proved to be unavailable, petitioner commenced these actions in the summer of 1975. She claimed that the composition of the student body at each school reflected discrimination against women generally and that the particular policy under which her application was denied by each school discriminated on the basis of sex in violation of Title IX and the HEW regulations thereunder. Specifically, she alleged that her application was denied at the initial screening level under a published admission policy of each school discouraging applicants over 30 years of age which had a disproportionately adverse effect upon women and did not validly predict success in medical school or practice.[2] She sought reconsideration of her applications with-

[2] The complaints are summarized in the prior opinion of this Court. 441 U. S. at 680-681.

out regard to said policies, an opportunity to rebut any alternative explanation for her rejection and other relief.

The basis for jurisdiction in the district court was that petitioner's claims are based upon federal civil rights law, 28 U.S.C. § 1343 (4). Although each respondent school acknowledged receipt of federal financial assistance and its obligation not to discriminate on the basis of sex, the complaints were dismissed for failure to state a claim upon which relief could be granted because Title IX did not authorize a private right of action. The court of appeals affirmed. On certiorari to decide the question of private enforceability of Title IX, this Court on May 14, 1979, reversed and remanded the case for further proceedings.

On June 12, 1979, HEW, in promulgating the Final Rule under the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, declared that age restrictions are not necessary to the operation of medical education programs and are therefore prohibited by the Act. 44 Fed. Reg. 33773. Both respondent schools (and virtually every other medical school in the United States) then abolished their age restrictions for 1980 and subsequent entering classes.

On remand in the district court, the schools renewed their motions to dismiss the complaints for failure to state a claim. This time they asserted that the constitutional standard of discrimination applied to Title IX and that petitioner had failed to allege their "purpose and intention" to discriminate against women in denying admission to otherwise qualified medical school applicants such as petitioner who were over 30 years of age.[3]

[3] Neither the district court nor the court of appeals decided the schools' alternative motions for summary judgment. Both schools admitted, however, that other applicants with lower grades and test scores were accepted in the classes to which petitioner applied.

Petitioner responded that the complaints did allege the respondents' discriminatory intent by claiming that their conduct was "arbitrary and invidious." She further offered "willingly" to amend the complaints if that allegation of respondents' purpose and intention to discriminate on the basis of sex was not sufficiently clear.[4] Respondents did not challenge the scope of the traditional "arbitrary and invidious" language. They claimed, however, that the allegation had been eliminated by the prior dismissal of her claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Fourteenth Amendment for a lack of state action.

The district court accepted petitioner's position that the allegation was still applicable and did encompass the requisite elements of purpose and intent. It ruled, however, the allegation was a "legal conclusion" which was not admitted *arguendo* by the motions to dismiss. The second appeal followed.

On May 6, 1981, the court of appeals, contrary to the district court, agreed with respondents and ruled that the "arbitrary and invidious" allegation was inapplicable to petitioner's Title IX claim.[5] The court further ruled that, even if the allegation were applicable to petitioner's claim under Title IX,

---

[4] Petitioner also contended that this Court's opinion that the "facts alleged in the complaints .... admitted *arguendo* by respondents' motion to dismiss the complaints, establish a violation of § 901(a) of Title IX," 441 U.S. at 680, precluded the renewed motions to dismiss. In the district court she also relied upon the decision of this Court in *Lau* v. *Nichols*, 414 U. S. 563 (1974) as well as disparate impact standard of Section 21(b)(2) of the Title IX regulations and the provisions of respondents' federal funding contracts which obligated them to observe the regulations. The United States as *amicus curiae* presented that argument on appeal.

[5] The court of appeals did not affirm the "legal conclusion" analysis of the district court. On the contrary, it expressly recognized "the liberal pleading requirements" of Rule 9(b), Fed. R. Civ. P., with respect to intent. 648 F. 2d at 1110; (App. p. 12a). This Court has since held that discriminatory intent is not a legal conclusion, but a pure question of fact. "It is not a question of law and not a mixed question of law and fact." *Pullman-Standard* v. *Swint*, ____ U. S. ____, 102 S. Ct. 1781 (1982).

"the generic 'arbitrary and invidious' language does not encompass any necessary element of intentional discrimination." 648 F. 2d at 1110; (App. p. 12a).[6] Neither the respondents nor the district court had asserted such a defect.

Based upon her earlier offer in the district court to clarify the point by amendment if necessary, petitioner moved for leave to cure the defects which had been established for the first time on appeal by amendment of the complaints in the court of appeals or to present motions for such amendment in the district court.[7] Alternatively, she requested an extension of time to petition for rehearing of the May 6, 1981 decision. On May 27, 1981, Judge Pell denied the motion to amend and granted the extension of time, in each case without comment or explanation. (App. p. 1b). Rehearing was denied on June 22, 1981. (App. p. 1c). Judge Pell's order of May 27, 1981 was not incorporated or referred to in the mandate of the court of appeals which issued on July 2, 1981.

On October 5, 1981, this Court denied a petition for a writ of mandamus urging the inconsistency of the decision below

---

[6] The opinion focused primarily on the issue of whether purposeful and intentional discrimination was required to violate Title IX. 648 F. 2d 1104-1109; (App. pp. 4a-10a). Petitioner did not directly contend otherwise in the court of appeals. *See* Note 4, *supra.* In fact, the opinion expressly noted at the outset that petitioner "maintains that the district court's holding that the constitutional (intentional) standard applied was 'premature' because she propose[d] to meet the constitutional standard in the district court." 648 F. 2d at 1105 n.1; (App. p. 3a n. 1).

[7] The offer to amend the complaints in the district court was omitted from the record on appeal pursuant to Circuit Rule 4(a). Since the district court had accepted petitioner's position that the "arbitrary and invidious" allegation of the complaints was applicable to the claim under Title IX and did encompass the "purposeful and intentional" elements of the constitutional standard of discrimination under the Fourteenth Amendment, it would have been inappropriate to act on the offer prior to the contrary decision on appeal.

with the prior decision of this Court. *In re Cannon*, 454 U. S. 811 (1981). On December 14, 1981, this Court denied a petition for a writ of certiorari urging the continued viability of *Lau*. 454 U. S. 1128 (1981). Justice White would have granted certiorari.

Motions for relief from judgment under Rule 60(b), Fed. R. Civ. P., in order to amend the complaints to correct the defects which had been established for the first time on appeal were presented in the district court and denied without comment or explanation on December 22, 1981.

Petitioner then sought a writ of mandamus confirming the authority of the district court to consider the motions for relief from judgment in order to amend the complaints and directing Judge Hoffman to vacate the orders denying the motions or to state the reasons for the denial thereof. The petition for mandamus was denied on February 4, 1982 on the ground that the effort to amend 19 months after the dismissals by the trial court was "belated". (App. pp. 1d-2d). Rehearing was sought based upon the fact that petitioner had sought leave to amend promptly after the May 6, 1981 opinion of the court of appeals had established the need for the amendments sought. Rehearing was denied on March 13, 1982 with the statement that petitioner's motion for leave to amend had been denied by the court of appeals on May 27, 1981. (App. p. 1e-2e).

On May 13, 1982, the court of appeals construed Judge Pell's procedural order of May 27, 1981 as having foreclosed the jurisdiction of the district court to consider petitioner's motions for relief from judgment in order to amend the complaints and dismissed her appeals of the denial thereof. (App. p. 1f-2f). Neither that decision nor Judge Pell's order gave any reason for such a foreclosure of the ordinary jurisdiction of the district court or for the denial of leave to amend. Rehearing was denied on October 6, 1982. (App. p. 1g-2g).

REASONS FOR GRANTING THE WRIT

1. The court of appeals has decided federal questions in a way in conflict with two applicable decisions of this Court.

a) *Lau* v. *Nichols*, 414 U. S. 563 (1974)

The May 6, 1981 decision of the court of appeals expressly rejected the continuing viability of the unanimous decision of this Court in *Lau*. 648 F. 2d at 1104-1109; (App. pp. 4a-10a). In *Guardians Association of Police* v. *Civil Service Commission of the City of New York*, Docket No. 81-431, this Court granted certiorari to consider questions involving the continued viability of *Lau*. Accordingly, petitioner incorporates by reference the reasons for granting the writ set out in the petition for a writ of certiorari in *Guardians*.

Petitioner further incorporates the reasons for granting the writ set out in her prior petition for a writ of certiorari in Docket No. 81-769. In addition petitioner submits that the decisions of the courts below denying her an opportunity to amend her complaints since the denial of that petition on December 14, 1981 have now foreclosed the possibility that it might have been premature to grant certiorari to consider the continuing viability of *Lau* in this case where the opinion of the court of appeals had noted at the outset that petitioner "propose[d] to meet the constitutional standard in the district court." 648 F. 2d at 1105 n. 1; (App. p. 3a n. 1).

b) *Foman* v. *Davis*, 371 U. S. 178 (1962)

In *Foman* this Court held that the denial of an opportunity to amend a complaint after appeal without any apparent or declared reason is an abuse of discretion.

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance to the amendments, futility of amendment, *etc.*—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of

> an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of that discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." 371 U. S. at 182.

Petitioner never "elected" to stand on her complaints rather than to amend them to cure the defects specified by the court of appeals on May 6, 1981. The opinion itself expressly noted petitioner's position that consideration of the proper legal standard for Title IX was "premature" because she proposed to meet the constitutional (intentional) standard which respondents sought to establish. 648 F. 2d at 1105 n. 1; (App. p. 3a n. 1).

The background of the pleading defects which petitioner sought to cure by amendment involved two factors. First, the continued applicability of the "arbitrary and invidious" allegation, although denied by respondents, had been accepted by the district court. Second, the insufficiency of the "arbitrary and invidious" language to embrace the constitutional standard of intentional discrimination, had not been relied upon by respondents or the district court. Thus, prior to the May 6, 1981 decision of the court of appeals, a formal motion for leave to cure such defects by amendment would have been inappropriate because the district court had accepted petitioner's position on the former and neither respondents nor the district court had relied upon the latter. The "legal conclusion" analysis of the district court had not been raised by respondents and was rejected by the court of appeals which expressly recognized "the liberal pleading requirements of Fed. R. Civ. P. 9(b)" with respect to intent. 648 F. 2d at 1110; (App. p. 12a).

The potential discretionary reasons for the denial of amendment after appeal, such as undue delay, which were set out in *Foman, supra,* 371 U. S. at 182, and referred to in the February 4, 1982 decision of the court of appeals denying a

related petition for mandamus in No. 81-3043 (App. p. 2d), would be inapplicable to Judge Pell's procedural order on May 27, 1981. All of such discretionary reasons involve factual determinations which should be made by a district court in the first instance. *Pullman-Standard, supra,* Note 5.

Respondents did not even assert any such discretionary reason in their opposition to petitioner's May 20, 1981 motion to amend in the court of appeals.[8] The record on appeal certainly did not support any requisite factual determination as the only possible conclusion on such matter. For example, respondents did not assert undue delay by petitioner in moving to amend. In fact there was no delay—and no other apparent reason for denial of the amendments sought by petitioner.

Accordingly, since there was no justifying reason apparent to deny amendment, and since none was declared, the court of appeals has foreclosed the jurisdiction of the district court to consider petitioner's motions for relief from judgment in order to amend her complaints in a way in conflict with the decision of this Court in *Foman.*

2. The court of appeals has decided an important question of federal procedure which has not been, but should be, settled by this Court.

Ordinarily, the question of amendment after appeal is within the sound discretion of the district court under Rules 15(a) and 60(b), Fed. R. Civ. P. Professor Moore states,

> "Unless the appellate court's adjudication precludes amendment or the appellate court itself grants leave to amend, the grant or denial of an amendment is within the

[8] Respondents' May 22, 1981 response in opposition to the motion to amend was based solely upon the assertion "that there had been no intentional discrimination." This clearly was no more than a denial of the facts alleged in the proposed amendments.

> sound discretion of the district court." 3 MOORE'S FEDERAL PRACTICE 15-147 (2nd Ed.) "Amendment After Appeal" ¶ 15.11.

See also, *Foman, supra,* and 6 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 1489 "Amendment after Judgment and Appeal," to the same effect. Mere failure or refusal by the appellate court to itself authorize the district court to consider amendment does not "preclude" the ordinary jurisdiction of the district court to do so in its own right.

In this case, the procedural order entered by Judge Pell on May 27, 1981 denied petitioner leave to amend the complaints in the court of appeals or to present motions for such amendment in the district court. It did not purport to foreclose the district court's own jurisdiction and authority to consider motions for relief from judgment in order to amend the complaints after the mandate of the court of appeals had issued.

The October 6, 1982 order of the court of appeals noted that "the issue of the denial of the motions to amend" in the court of appeals had been raised in the petition for rehearing which was denied on June 22, 1981. (App. p. 2g). It would be incorrect, however, to infer that such petition had presented any issue as to the jurisdiction of the district court to consider motions under Rules 15(a) and 60(b) in its own right or as to the authority of a single judge of the court of appeals to foreclose such jurisdiction.

The stated purpose of the motion to amend the complaints in the court of appeals or to present motions for such amendment in the district court was that such "amendment of the complaints and further proceedings in the district court would better serve the ends of justice in this protracted litigation than a petition for rehearing and further appellate review." (Motion 5/20/81 p. 2). Granting of that motion would have averted the need for petitioner to seek rehearing in the court of appeals as

well as mandamus and certiorari in this Court without risking her entire claim, including the potential benefit of the continued viability of *Lau*, on the success of a motion for relief from judgment in the district court.

Accordingly, the court of appeals has decided that its prior authorization is required for a district court to consider a motion for relief from judgment in order to amend a complaint after appeal under Rules 15(a) and 60(b), Fed. R. Civ. P. Alternatively, it has decided that a single circuit judge may foreclose the jurisdiction of the district court to consider such motions in a procedural order notwithstanding the limitations of Rule 27(c), Fed. R. App. P., on decisions by a single judge and the fact that such procedural order was not incorporated in its mandate. In either event, the court of appeals has decided an important question of federal procedure which has not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decisions of the United States Court of Appeals for the Seventh Circuit affirming the renewed dismissal of the complaints and denying petitioner an opportunity to correct the defects by amendment.

If *Lau* is reaffirmed in *Guardians* before a decision is reached on the merits of the questions presented herein, the judgment affirming the dismissal of the complaints and the orders denying amendment should be vacated by summary action and the cause remanded for further proceedings in light of such a decision in *Guardians.*

Respectfully submitted,

JOHN M. CANNON
Attorney for Petitioner

Suite 842
20 North Wacker Drive
Chicago, Illinois 60606
(312) 263-5163